S. LOURDENADIN

v.

M. RATNAVALE NEE ANNALAKSHMI VATTIVELU & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. 1166 OF 1974]
2 SEPTEMBER 1985

LAND LAW: *Conveyancing - Sale and purchase of land - Rescission - Whether valid termination - "Fraud and misrepresentation" - Definition in s. 17, 18 of Contracts Act 1950 - Date of completion - Specific performance - Laches - Forfeiture of deposit - Removal of caveat - Assessment of damages - Indefeasibility - National Land Code, ss. 116, 279, 280, 294, 299, 306, 314, 340(2)(a).*

EVIDENCE: *Section 154 Evidence Act - Hostile witness - Cross-examination - Discretion of Court.*

CIVIL PROCEDURE: *Specific performance - Laches - Delay in prosecution of claim - Section 6(1)(a) and s. 9(1) of Limitation Act - Whether barred - Prejudicial to defendants - Applicability of s. 32 of Limitation Act - Section 19 of Specific Relief Act.*

The 1st defendant who was the registered proprietor of a piece of land entered into a sale and purchase agreement (hereinafter referred to as "the first agreement") with the plaintiff on 14 July 1972. There were two conditions precedent to the sale of the property, that is, the sale was subject to the 1st defendant applying to the Ruler-in-Council for an extension of time to enable the plaintiff to build a house once the said land was transferred to her. In November 1967, the 1st defendant had created a charge over the said land and the sale was also subject to the 1st defendant obtaining a valid discharge of the charge that was then still existing. The relevant clauses in the first agreement provided that the balance of the purchase price was to be settled on 4 October 1972 or within 14 days of the Ruler-in-Council granting an extension of time, whichever was later.

There was some delay in the application and approval for the extension of time and impatient with this delay, the 1st defendant sought to vary the first agreement by requesting the plaintiff for two-thirds of the purchase price. Further numerous communications took place between the parties' solicitors. On 1 June 1973, the 1st defendant insisted that the sale be completed within one month from the date of the letter. The plaintiff replied on 9 July 1973, that she could not agree that the sale be completed before the extension of time was obtained as the sale was subject to the 1st defendant obtaining such extension. The 1st defendant then unilaterally terminated the first agreement.

The 1st defendant then entered into another sale and purchase agreement (hereinafter referred to as "the second agreement") with the 2nd defendant, her brother-in-law Dr. M. Mahadevan s/o Mahalingam. The 2nd defendant paid up all sums owing under the second agreement and the only matter then remaining outstanding before the said land could be transferred to him was the settlement of a loan and the discharge of the charge. Meanwhile, the plaintiff's first solicitors sent cheques representing the balance of the purchase price due under the first agreement to the 1st defendant. The 1st defendant was also reminded to discharge the charge. On their part, steps were taken by the 1st and 2nd defendants to discharge the charge and to register the transfer of the land to the 2nd defendant subject to the discharge of the charge.

Through all the above happenings, 1st defendant had changed solicitors thrice. When the plaintiff's solicitors finally realised that the 1st defendant had entered into a second agreement with the 2nd defendant they informed the 1st defendant that the 1st defendant's termination of the agreement was wrongful and she (the 1st defendant) was asked to reconsider her decision, failing which, the plaintiff would take the matter to Court. The 1st defendant replied, through her solicitors, that the agreement had been rightfully terminated.

The plaintiff filed the present action on 20 September 1974 and lodged a private caveat on 28 June 1978 but this was removed by the Registrar on 9 June 1983. The plaintiff entered a second private caveat on 18 August 1983 and by a subsequent application to have it removed, Vohrah J held that the plaintiff's private caveat should be allowed to remain until after the trial of this action, a decision that was subsequently confirmed by the then Federal Court.

On the merits of the case, the following issues were raised:

(a) Whether the repudiation of the first contract by the 1st defendant was valid.

(b) If not, whether specific performance can lie against her.

(c) If it does, whether the defence of laches bars such a remedy being decreed against her.

(d) Whether the allegations of fraud and misrepresentation have been proved against the 2nd defendant.

(e) The proper reliefs to be granted to the plaintiff in the event she succeeds against both defendants.

Held:

[1] From the evidence, it is clear that it is the 1st defendant who had breached the first contract when she rescinded it long before the date of completion of the contract was due.

[2] The plaintiff filed this action within the time specified under ss. 6(1)(a) and 9(1) of the Limitation Act 1953.

[3] On the 1st defendant's contention that the plaintiff delayed in prosecuting her claims against her and therefore prejudicing the 1st defendant, it is clear from the facts and evidence that it is not the plaintiff alone who had delayed in prosecuting her claims as both the defendants and the Court had contributed to the delay. In this present instance although there had been delay, it had not acted prejudicially against the defendants.

[4] Where there is a statutory period of limitation, laches has no application as the limitation period must be applied. Moreover on the facts of the case there are special circumstances of allegations of fraud and misrepresentation which make it unjustifiable that the plaintiff's claim can be defeated by the delay in enforcing her claim.

[5] The proper way of interpreting the meaning of Clause 9 of the first agreement is to view the first agreement in its entirety. The agreement is a preconditioned agreement enforceable only upon the granting of the extension of time by the Ruler-in-Council. In the event the extension was not granted, the agreement comes to an end and the 1st defendant will have to refund the deposit made by the plaintiff. If on the other hand, approval was granted but the 1st defendant refuses to perform, the plaintiff's remedies against her are not only damages for the breach but also specific performance of the contract (see s. 19 of the Specific Relief Act 1950).

[6] There is overwhelming evidence in this case that the fraud and misrepresentations particularised in para. 13 of the statement of claim have been proved beyond reasonable doubt.

[7] On the defendants' contention that the failure of the plaintiff to lodge a caveat over the land from 1973 to 1978 should be held against her, the rule that the first in time gets priority when there are two equal and competing claims does not apply here. In this case, the dealings of the 2nd defendant all along have been fraudulent and it cannot be said that he had been in any way prejudiced by the failure of the plaintiff to lodge a caveat. Therefore the 2nd defendant's title has been shown to be not indefeasible.

[8] The proper measure of damages in this case must be the loss suffered by the plaintiff for being deprived of the use of the land.

Judgment against the 1st defendant on the following terms:

(i) Specific performance of the first agreement with the plaintiff paying the balance of the purchase price within one month from the date hereof and the 2nd defendant obtaining a valid discharge of the charge within one month of the payment of the balance of the purchase price and to execute the memorandum of transfer in favour of the plaintiff within one month thereafter.

(ii) Damages at RM9,300 pursuant to s. 75 of the Contracts Act 1950 and interest at 6% p.a. from 23 July 1973 to date hereof to be awarded to the plaintiff.

(iii) Counterclaim of 1st defendant dismissed with costs.

Judgment against the 2nd defendant on the following terms:

(i) The Registrar of Titles to cancel the title in continuation, to delete the discharge of charge and to restore the same on to the registry document of title and to cancel the transfer registering the said land to the 2nd defendant in the registry document of title.

(ii) Damages at RM116,249.20 which will carry interest at 6% p.a. from 23 July 1973 to date hereof to be awarded to the plaintiff.

(iii) Counterclaim of 2nd defendant dismissed with costs.

[Plaintiff awarded costs of this suit.]

Cases referred to:
Amathayaramal v. The Official Assignee, High Court Madras [1933] IC 629
Re Pauling's Settlement Trust [1961] 3 All ER 713
Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor [1982] 2 MLJ 92
Assets Co. Ltd v. Mere Roihi [1905] AC 176
Waimiha Sawmilling Co. v. Waione Timber Co. [1926] AC 101

Legislation referred to:
Contract Act 1950, ss. 17, 18
Evidence Act 1950, ss. 154, 144(g)
Evidence Act 1872 [Ind], s. 154
Limitation Act 1939 [UK], s. 29
Limitation Act 1953, ss. 6(1)(a), 9(1), 32
National Land Code 1965, ss. 166, 279, 280, 294(4), 299(1), 306, 340(2)(a), 314
Penal Code, ss. 199, 200
Specic Relief Act 1950, s. 19
Statutory Declarations Act 1960, s. 3

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 16, p. 1005

For the plaintiff - T. Thomas; M/s. Skrine & Co.
For the 1st defendant - R. Arunachalam; M/s. Manjit Singh Sachdev & Co.
For the 2nd Defendant - G. Sri Ram (Joseph Yeo with him); M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Siti Norma Yaakob J:

The facts leading to this cause of action dates back to 1972 and to appreciate the parts played by the parties, I shall deal firstly with the events as they appear in the Agreed Bundle of Documents, AB1 - 129.

Prior to 14 July 1972, the plaintiff and first defendant who were known to each other, negotiated through their respective solicitors, Messrs. Ng Ek Teong & Partners and Messrs. Jayadeva and Zahir for the sale and purchase of a piece of land known as Lot 9987 held under Grant No. 15434 in the Mukim of Batu, Lorong Kenny Bahagia in the town of Kuala Lumpur (hereinafter called "the said land"). The first defendant was the registered proprietor of the said land since 13 March 1967, but on 2 November 1967, she created a charge over it in favour of one K. Sinnatamby since deceased (hereinafter called "deceased chargee").

Negotiations for the sale culminated in a sale and purchase agreement (hereinafter called "the first agreement") dated 14 July 1972, AB9 - 14, but it was only stamped on 19 February 1973. The purchase price was agreed at RM93,000, but as the title of the said land contained a condition that the registered proprietor shall build a dwelling house on it within eighteen months of occupation, a condition that was not exercised by the first defendant, the sale was subject to her applying to the Ruler-in-Council for an extension of time to enable the plaintiff to build a house as was her intention once the said land was transferred to her. (See P133). The sale was also subject to the first defendant obtaining a valid discharge of the charge that was then still existing in favour of the deceased chargee so that she could deliver the said land to the plaintiff, free from any incumbrance.

Out of the purchase price of RM93,000, RM9,300 representing 10% of the purchase price was paid by the plaintiff to the defendant on 5 July 1972, AB6, as deposit and to account for the purchase price and the balance was to be settled on 4 October 1972 or within 14 days of the Ruler-in-Council granting an extension of time, whichever was later.

On 8 September 1972, pursuant to written instructions contained in AB7, Messrs. Ng Ek Teong & Partners, acting as agents for the first defendant, proceeded at AB18 to apply to the Collector of Land Revenue, Kuala Lumpur for the extension of time to build a house on the said land. As the issue document of title, P132 had to be produced together with the first defendant's application, her solicitors, Messrs. Jayadeva & Zahir, at AB19, requested one Dr. S. Thuraisingham, the administrator of the estate of the deceased chargee to deliver P132 to Messrs. Ng Ek Teong & Partners for onward transmission to the Collector of Land Revenue. P132 was subsequently delivered to Messrs. Ng Ek Teong & Partners on 4 October 1972, AB20, and from that date onwards it had always remained in the custody of Messrs. Ng Ek Teong & Partners until 18 June 1985 when it was handed to Messrs. Skrine & Co., the plaintiff's present solicitors. (See AB131).

On 15 November 1972, Messrs. Jayadeva & Zahir, at AB21, wrote the first of many letters to Messrs. Ng Ek Teong & Partners, enquiring whether approval for the extension of time had been obtained and if so, when the plaintiff would pay the balance of the purchase price.

Impatient with the delay as to the outcome of her application and pressed by her creditors, the first defendant at AB22, sought a variation of the first agreement by requesting the plaintiff for an additional payment representing two-thirds of the purchase price. Following this request, Mr. Jayadeva who was personally handling the first defendant's matter conferred with the plaintiff's solicitor at the latter's office in Kuala Lumpur and there appears to be an undertaking given by the latter that he would advise his client to make a payment of RM10,000 towards the purchase price. However, the plaintiff consented to pay only RM9,300 and a cheque for this amount was forwarded on 22 March 1973, AB26, but the first defendant refused to accept it and she returned it to the plaintiff on 26 March 1973, AB27.

On 6 April 1973, Messrs. Ng Ek Teong & Partners received a letter from the Collector of Land Revenue, Kuala Lumpur, AB28, informing them that the application for extension must be made by the registered proprietor, the first defendant, personally and not through her agents. Messrs. Ng Ek Teong & Partners prepared the necessary application in Malay and sent it to Messrs. Jayadeva & Zahir through their covering letter, AB29, requesting that the first defendant sign the application promptly and return it to them for onward transmission to the Collector.

Following this and pursuant to a telephone conversation, Messrs. Ng Ek Teong & Partners once again forwarded the plaintiff's cheque of RM9,300 to Messrs. Jayadeva & Zahir, the very same cheque that was refused and returned by the first defendant 2 months earlier. Upon receipt of this cheque, for the second time, the first defendant returned it again to the plaintiff on 1 June 1973, stating that she no longer wanted part payment but insisted that the sale be completed within one month from the date of the letter, AB31, regardless of whether the extension of time had been obtained or not. In the same letter too, the signed applications for extension were also enclosed and the original was subsequently submitted by Messrs. Ng Ek Teong & Partners to the Collector of Land Revenue on 2 July 1973, AB35.

In response to the first defendant's insistence that the sale be completed by 1 July 1973, the plaintiff pointed out in her letter dated 9 July 1973, AB36 that she cannot agree that the sale be completed before the extension of time was obtained as the sale was subject to the first defendant obtaining such extension. Then on 23 July 1973, the first defendant, through her new solicitors, Messrs. Khong & Son, informed Messrs. Ng Ek Teong & Partners, that as the plaintiff had failed to complete the sale within one month from 1 June 1973, the first defendant was at liberty to terminate the first agreement which she did with immediate effect.

Following this termination, the first defendant entered into another sale and purchase agreement, AB39 - 41, (hereinafter called "the second agreement") on 9 September 1973, this time with the second defendant, her brother-in-law, and one of the executors of her late husband's estate, for the sale of the same property to him. In this second agreement, the purchase price was agreed at RM90,000, RM5,000 of which was acknowledged as being paid by the second defendant on the execution of the agreement. (See Clause 2 at AB40). Under Clause 3 and 4 of the second agreement, the second defendant also undertook not only to pay all arrears of quit rent, penalties and premiums due on the said land, but also the principal and accumulated interest due on the loan that was secured by the charge, thereby undertaking to obtain a discharge of the charge as well. It was also agreed that all such moneys expended by him would be set off against the balance of the purchase price. The balance of the purchase price was to be settled by 1 February 1974, or on such extended period (see Clause 6 at AB40) and that the said land shall be transferred to the second defendant free from any incumbrance.

On 4 October 1973, the second defendant paid RM50,000 to the first defendant being the balance of the purchase price and to protect his interest he lodged his first private caveat on 13 October 1973. The only matter then remaining outstanding before the said land could be transferred to him was the settlement of the loan and the discharge of the charge.

Then on 15 October 1973, AB43, Messrs. Ng Ek Teong & Partners, undaunted by the notice of the termination of the first agreement submitted two cheques, to Messrs. Khong & Son, one amounting to RM74,400 and the other for RM9,300, the latter being a replacement of the cheque that was refused and returned by the first defendant twice. These two cheques represented the balance of the purchase price due under the first agreement and accompanying them were also copies of the Memorandum of Transfer, Form 14A to be executed by the first defendant. Together with the cheques and Form 14A, the first defendant was also reminded to take the necessary steps to discharge the charge.

As at this stage both the plaintiff and the second defendant were equally anxious to get the charge discharged. To that end Messrs. Datuk Clough Thuraisingham, Raj & Co. acting for both the first and second defendants at AB51, wrote to Dr. S. Thuraisingham, the administrator for the estate of the deceased chargee enclosing a cheque for RM38,910 in settlement of the loan and requesting him that P132 be handed to them together with the Memorandum of Discharge for onward transmission to the Collector for purposes of cancelling the charge. At the same time, Messrs. Jayadeva & Zahir, purporting to act for the first defendant, also wrote to Messrs. Ng Ek Teong & Partners, enquiring as to the progress made in the application for extension and at the same time requesting for the return of P132 to Dr. S. Thuraisingham.

Then on 20 October 1973, the second defendant appearing to be acting on his own, wrote directly to the Registrar of Titles AB58, enclosing an application for the removal of the private caveat he had lodged a week earlier and a Form 14A transfer duly executed and stamped seeking transfer of the said property to him from the first defendant. In the same letter, he also mentioned that the loan due on the charge had been settled with the administrator of the deceased chargee but he, the administrator could do nothing to effect the discharge of the charge as P132 had been misplaced. As there would be delay in tracing P132, the second defendant in AB58 urged the Registrar to register the transfer of the land to him subject to the discharge of the charge. The Registrar appears to have accepted and acted on the second defendant's application for the removal of his private caveat as there is an endorsement in P135, the registry document of title that the private caveat lodged by him on 13 October 1973 was cancelled on 20 October 1973. However he did not effect the transfer as can be seen from the events that followed.

In the meantime, Messrs. Khong & Son who had received the two cheques and Form 14A in settlement of the balance of the purchase price under the first agreement returned the two cheques and Form 14A to Messrs. Ng Ek Teong & Partners stating that they could not accept the cheques as the first agreement had already been terminated. Thinking perhaps that payment had been made to the wrong solicitors, as at that stage, Messrs. Jayadeva & Zahir had not yet confirmed whether they were still acting for the first defendant, Messrs. Ng Ek Teong & Partners proceeded to send the two cheques together with Form 14A to Messrs. Jayadeva & Zahir instead on 24 October 1973, AB64. AB64 however crossed with Messrs. Jayadeva & Zahir's letter, AB70, wherein they confirmed they no longer acted for the first defendant and they returned all the enclosures that came together with AB64.

Realizing the position that the plaintiff was then placed, Messrs. Ng Ek Teong wrote to Messrs. Khong & Son at AB73 stating in no uncertain terms that the unilateral act by the first defendant terminating the first agreement was wrongful as it was in complete disregard to Clause 3 of AB10. The first defendant was asked to reconsider her action, failing which, the plaintiff would take the matter to Court. In the same letter, the two cheques for the balance of the purchase price were again enclosed.

In response to AB73, Messrs. Khong & Son maintained that the first defendant was not about to change her mind as she considered that the first agreement had been rightfully terminated and the cheques were accordingly returned to Messrs. Ng Ek Teong & Partners.

Back to Messrs. Datuk Clough Thuraisingham, Raj & Co., they confirmed with Messrs. Khong & Son that the amount due to the estate of the deceased chargee had been settled in full and that the only matter remaining outstanding was for P132 to be returned to Dr. S. Thuraisingham to enable him to prepare the Memorandum of Discharge and execute the same. A similar letter calling upon Dr. S. Thuraisingham to expedite the execution of the Memorandum of Discharge was also sent by Messrs. Datuk Clough Thuraisingham, Raj & Co. On 26 November 1973, AB80. Responding to this request,. Dr. S. Thuraisingham at AB81 informed the solicitors of both the first and second defendants that he had been advised by Messrs. Jayadeva & Zahir that P132 was still with Messrs. Ng Ek Teong & Partners and as such, he was not prepared to accept payment of the loan secured by the charge and he accordingly returned the two cheques to Messrs. Datuk Clough Thuraisingham, Raj & Co. who remitted it back to Dr. S. Thuraisingham demanding that he execute a registrable Memorandum of Discharge of the charge, failing which, legal proceedings would be commenced against him.

The next stage of events sees the second defendant for the second time writing directly to the Registrar of Titles, Selangor on 30 November 1973, AB84 informing him that the administrator of the estate of the deceased chargee was not willing to accept payment of the loan as he could not execute the Memorandum of Discharge of the charge as he did not have P132 with him. That being the case, the second defendant enclosed a cheque for RM32,615 in the same letter being the amount outstanding on the loan by way of payment to the Registrar and requested him to register a discharge of the charge under s. 279 of the National Land Code, 1965. Following this, the second defendant made a statutory declaration dated 12 March 1974, AB89, declaring that the deceased chargee had died on 17 February 1971 and that he had made every effort to obtain P132 from the beneficiary of the estate but to no avail and through AB89 he applied for a title in continuation.

In the meantime, Messrs. Ng Ek Teong & Partners made enquiries at the Land Office, Kuala Lumpur, as to the progress of the application for extension, and they were surprised to learn that the first defendant had been notified on 13 March 1974 that the application had been granted but the plaintiff had not been informed accordingly. Having been made wiser by this, Messrs. Ng Ek Teong & Partners on 14 May 1974, AB91 wrote directly to the first defendant asking her to whom the balance of the purchase price should be paid. The first defendant refused to accept delivery of AB91 and as a result, on 8 July 1974, Messrs. Ng Ek Teong & Partners wrote to Messrs. Khong & Son informing them of the first defendant's attitude and asking them whether they would accept the balance of the purchase price. Messrs. Khong & Son responded by stating that as the first agreement had already been validly terminated, they cannot entertain any further correspondence on the matter.

Over at the Land Office, Kuala Lumpur, the Registrar, presumably acting on AB84 cancelled the charge on 5 December 1973 under s. 314 of the National Land Code, 1965, and to protect his interest, the second defendant entered his second private caveat, AB47, on the said land on 25 February 1974. This was withdrawn on 13 March 1974 when the Memorandum of Transfer executed by the first defendant in favour of the first defendant was registered on the same day which incidentally was the very day when the first defendant was informed that her application for extension was approved by the Ruler-in-Council.

Following this, the Registrar acting on AB89, served the second defendant with a Form 10D which is a notice of intention of issue a title in continuation and in Federal Gazette No. 2982 dated 13 July 1974, AB94, the Registrar gave notice that acting in pursuant to s. 166 of the National Land Code, 1965, he proposed to issue a title in continuation of the said land on the ground that "the old grant had been lost".

Five months later, on 22 August 1974, P132 which has been accepted to have been lost was cancelled by the Registrar and a title in continuation, Grant No. 17, P136 issued the same day in favour of the second defendant.

Feeling cheated, the plaintiff filed the present action on 20 September 1974 and almost four years later, lodged a private caveat on 28 June 1978, AB123, but this was removed by the Registrar on 9 June 1983, upon receipt of AB111. The plaintiff entered a second private caveat on 18 August 1983, AB126 and in a subsequent application by the second defendant to have it removed, Vohrah J held that the plaintiff's private caveat should be allowed to remain until after the trial of this action, a decision that was subsequently confirmed by the then Federal Court.

In her amended statement of claim, the plaintiff has pleaded that the first defendant had no right in law to rescind the first agreement on 23 July 1973 and as against both defendants, that they had conspired to deprive her of the said land by fraud and misrepresentation, the particulars of which are set out in para. 13 of the Amended statement of claim. The reliefs she seeks are:

(1) as against the first defendant specific performance of the first agreement;

(2) as against the second defendant cancellation of P136, and cancellation of the memorial entered on P135 whereby proprietorship of the said land was transferred to the second defendant;

(3) damages against both defendants;

(4) that the memorial register entered on P135 whereby the charge in favour of the deceased chargee be deleted and the memorial in respect of the same charge be restored to the register;

(5) interests and costs.

The defences raised by the first defendant are:

(1) that she had validly rescinded the first agreement as the plaintiff had failed to pay the balance of the purchase price on the day fixed for completion pursuant to Clause 8 of AB13;

(2) a denial of the conspiracy to defraud and misrepresent to the plaintiff as all her dealings with the second defendant were above board;

(3) alternatively, if she had breached the first contract, the plaintiff is only entitled to be refunded the sum of RM9,300 paid as deposit and another sum of RM9,300 as liquidated and ascertained damages under Clause 9 of AB13;

(4) laches on the part of the plaintiff in prosecuting her claim, the facts of which appear in para. 22 (a-f) of the amended statement of defence.

As she has also pleaded that the plaintiff had breached Clause 3 of AB9, she also counterclaims that the first agreement be declared absolutely determined and the deposit of RM9,300 paid by the plaintiff be declared as having been forfeited by her by way of liquidated and ascertained damages under Clause 8 of AB13. She also counterclaims that the private caveat lodged by the plaintiff be removed.

The second defendant raised two defences:

(1) a denial of the allegation of fraud and misrepresentation; and

(2) laches on the part of the plaintiff in failing to prosecute her claim.

As he also claims that he had acquired the said land in good faith and for valuable consideration, he counterclaims that the plaintiff be condemned in damages for having wrongfully lodged the private caveat.

In the course of the trial, Counsel for the plaintiff made two applications, one to amend the amended statement of claim and the other to cross-examine the second defendant under s. 154 of the Evidence Act 1950. The amendments relate to the addition of three letters "mis" before the word "represented" in para. 13 (a-d) and the introduction of a new para. 14 wherein the plaintiff pleaded that by virtue of her allegations of fraud and misrepresentation against the second defendant his title to the said land is not indefeasible by virtue of s. 340(2)(a) of the National Land Code 1965.

I had disallowed the first amendment as the word "represented" in para. 13 (a-d) is already clear in intent and meaning and the addition of the three letters "mis" before it appears to be redundant and unnecessary. I had however allowed the second amendment and ruled that the inclusion of para. 14 in no way introduces a new cause of action as what is pleaded in the natural consequence of the allegations of fraud and misrepresentation contained in para. 13 and as such in no way prejudices the second defendant. However as the amendment was made at the trial itself, I had allowed that costs occasioned by such in no way prejudices the second defendant. However as the amendment was made at the trial itself, I had allowed that costs occasioned by such amendment be awarded to the second defendant in any event.

At the close of the plaintiff's case, both the first and the second defendants elected not to lead any evidence but to rely on the submissions that they have no case to answer but all the same, the plaintiff called both of them as her witnesses, thereby, re-opening her own case. Counsel for the second defendant whilst agreeing that it is permissable for the plaintiff to do so, objected to the strategy taken on the grounds that it is not desirable as it renders nugatory the second defendant's right to remain silent. As there is a right for one party to a suit to call the other party in the same suit as its witness, I do not consider that the second defendant's objection is maintainable. There is no bar to the course taken by the plaintiff and the right of the second defendant to remain silent must therefore be read subject to the plaintiff's right to call him as her witness.

In the course of his giving evidence for the plaintiff, the second defendant appeared evasive and avoided replying directly to Counsel's questions. This prompted Counsel to apply to cross-examine him under s. 154 of the Evidence Act 1950 which states that:

the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Counsel for the second defendant maintained that this is not a fit and proper case for the Court to exercise its discretion as the second defendant had not been shown to be hostile.

Our s. 154 is in *pari materia* with s. 154 of the Indian Evidence Act 1872 and the case of *Amathayaramal v. The Official Assignee, High Court Madras* [1933] IC 629 provides the following guidelines how this discretion can be exercised.

(1) Before the procedure can be adopted, the party wishing to cross-examine its own witness, must formally ask and obtain the Court's permission.

(2) It is not necessary that the witness should first of all be determined to be hostile as in the law and practice in England.

(3) Although s. 154 gives the Court unfettered discretion, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which make it necessary for facts to be got from the witness by means of cross-examination.

What had happened during his examination-in-chief was that the second defendant refused to explain why he had used the word "misplaced" in his letter, AB58, when giving evidence as to the whereabouts of P132. This lack of co-operation, I suppose, is to be naturally expected for the second defendant is after all the plaintiff's adversary. As the purpose of a trial is not only to get down to the bottom of the dispute, but also to find out if the witness desires to tell the truth, I had concluded that the only way this purpose can be achieved, is for the plaintiff to cross-examine the second defendant and I had accordingly allowed her to do so.

Coming now to the merits of the case, a number of issues were raised which I summarise broadly as follows.

(1) Whether the repudiation of the first contract by the first defendant on 23 July 1973 was validly done.

(2) If not, whether specific performance can lie against her.

(3) If it does, whether the defence of laches bars such a remedy being directed against her.

(4) Whether the allegations of fraud and misrepresentation have been proved against the second defendant.

(5) The proper reliefs to be granted to the plaintiff in the event she succeeds against both defendants.

As repudiation of the first agreement by the first defendant on 23 July 1973 was on the basis that the plaintiff had breached Clause 3 of AB10, I shall now consider whether there are evidence to support such a contention. Clause 3 stipulates that the completion date of the sale and purchase of the said land was upon payment of the balance of the purchase price on 4 October 1972 or within 14 days of the Ruler-in-Council granting an extension of time whichever the later. As at 4 October 1972, the proper application for extension was not even submitted to the Collector (such application submitted only on 2 July 1973 AB35) and it therefore fell on the happening of the second event to determine the completion date, i.e. the granting of the extension of time by the Ruler-in-Council. It is from the date of such approval that time became an essence of the contract and the plaintiff had 14 days from that date within which to pay the balance of the purchase price. If she had defaulted, the first defendant is only then entitled to rescind the contract and to forfeit the deposit that had

already been paid as liquidated and ascertained damages for the breach. This is clearly spelt out in Clause 8 of AB13 and this is the only provision in the agreement that empowers the defendant to terminate the contract.

When was the approval for extension granted by the Ruler-in-Council? The first defendant admitted that she was formally informed of it on 13 March 1974, but she contends that as Messrs. Ng EK Teong & Partners had prior knowledge of it as expressed in their letter, AB75, dated 15 November 1973, then the 14 days shall run from that date. In AB75, they had stated that

> ...approval had already been given and that we shall shortly be formally notified of such approval by the Collector.

The formal notification, however, never reached Messrs. Ng Ek Teong & Partners as the Collector must have communicated directly with the first defendant, informing her that approval had been granted on 13 March 1974, a fact concealed by the first defendant but was discovered by Messrs. Ng Ek Teong & Partners, upon enquiries made by them to the Collector.

I do not consider that the oral knowledge acquired by Messrs. Ng EK Teong & Partners in AB75 amounts to the extension of time having been granted for until a formal notification of such approval has been received, there is no proof that the extension was in fact granted by the Ruler-in-Council. To that end, it was wrong for the first defendant to assert that as Messrs. Ng Ek Teong & Partners had knowledge of such approval on 15 November 1973, time started to run as at that date. To hold otherwise would amount to accepting the fact that approval was granted on 15 November 1973, which in reality was not the case as the first defendant had admitted that she was notified officially of the approval on 13 March 1974. It is from 13 March 1974, the date a formal notification that time started to run and the plaintiff had therefore until 27 March 1974, within which to settle the balance of the purchase price. However, she did not do so as neither she nor her solicitors were aware that approval had already been granted as the first defendant had kept such information to herself, despite the fact that Messrs. Ng Ek Teong & Partners had acted as her agents in the application for extension. It was only upon discovery that the solicitors wrote AB19 dated 14 May 1974, directly to the first defendant but she refused to accept the letter as by then, she had already taken the stand that the plaintiff had breached the contract for failing to pay her the balance of the purchase price by 1 July 1973. As there is no provision in the contract that empowers the first defendant to determine the contract other than in circumstances stipulated by Clause 8 she was therefore clearly in breach when she unilaterally tried to vary the contract by imposing a condition that the plaintiff complete the sale within 1 month from 1 June 1973 and to that end, it follows that her subsequent act in rescinding the contract on 23 July 1973 is null and void.

Even assuming that by 15 November 1973, the plaintiff had knowledge of the approval, there is evidence to show that a day earlier on 14 November 1973, (AB73-74) she had already submitted the balance of the purchase price although the circumstances why she had done so was not in pursuant to Clause 3 but pursuant to a request made by the first defendant that she settle the balance as soon as possible to alleviate her financial problems. (See AB22).

From the evidence, it is abundantly clear that it is the first defendant who had breached the first contract when she rescinded it long before the date of completion of the contract was due.

Having established that the first defendant was in breach, can specific performance lie against her on the first agreement? She replies in the negative on the grounds

(1) that the plaintiff had been guilty of unreasonable delay in prosecuting this suit against her, and

(2) under Clause 9 of the AB13, the plaintiff's only remedy against her is for liquidated damages which has been agreed between them at RM9,300.

The defence of laches bars a plaintiff from succeeding in his equitable remedy for specific performance as a Court will not entertain any stale demand where the plaintiff had slept on his rights and acquiesced for a great length of time.

Under ss. 6(1)(a) and 9(1) of our Limitation Act 1953, actions founded in contract and for the recovery of land must be brought within 6 years and 12 years respectively from the date when the cause of action accrued. As I have already held that the first defendant had breached the first contract on 23 July 1973, the plaintiff had within 6 years and 12 years from the date to sue the first defendant for the breach and for the return of the land. She had filed this present action on 20 September 1974 and clearly this action is not statute barred. However, the delay that is objected to by the first defendant is not delay in bringing the action but delay in the plaintiff prosecuting her claims against her as she maintains that she has been prejudiced since her Counsel, Mr.Jayadeva, from whom she could have relied to assert her own claim had died in May 1982. In addition, she also relies on s. 32 of the Limitation Act 1953 which states that:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

Incidentally the second defendant also relies on the same grounds to dispute the plaintiff"s claim against him.

A perusal of the Court records shows that the plaintiff had retained two firms of solicitors, initially Messrs. Ng Ek Teong & Partners and from 8 February, 1980, Messrs. Skrine & Co., her present solicitors. Not to be outdone the first defendant had been in the habit of changing her solicitors. From the beginning she had retained Messrs. Jayadeva & Zahir from Penang and had also instructed Messrs. Ng Ek Teong & Partners, the plaintiff's solicitors to act as her agents in her application for the extension of time to the Ruler-in-Council. On 23 July 1973, Messrs. Jayadeva & Zahir were replaced by Messrs. Khong & Son of Ipoh and it was they who indicated her intention to determine the first agreement on 23 July 1973. After this she instructed Messrs. Datuk Clough Thuraisingham, Raj & Co. to represent her in getting the discharge of the charge over the land. Later when she entered appearance to this action on 10 February 1975, she did so through another firm of solicitors, Messrs. Nahappan, Muthu & Peri of Seremban and they remained her solicitors until they discharged themselves on 15 April 1982. Five months later, Messrs. Nahappan, Muthu & Peri who by then were known as Messrs. Muthu & Partners came back into the picture as they were retained again by the first defendant on 24 February 1982. In all she had the benefit or otherwise of the legal advice of six different firms of solicitors.

This regular practice of hopping from one firm of solicitors to another must take its toll in that a lot of time, not to mention expenses, must have been wasted as with each change of solicitors, the new firm would have to study the brief from the very beginning.

Another instance of delay apparent on the Court file is the attitude of the first defendant in trying to evade service each time the necessary papers were to be served on her. The original statement of claim had to be served on her by way of substituted service on 5 February 1975, at the same address in Penang that she had maintained throughout these proceedings. After this action was placed in the fixing list on 29 July 1978, no further action was taken by either party until Messrs. Skrine & Co. filed a change of solicitors on 8 February 1980. I cannot elicit any reason from the Court file for the cause of this delay. However the first step taken by Messrs. Skrine & Co. was to apply to amend the statement of claim by adding the second defendant a party to this action and following a number of adjournments, two at the instance of the first defendant, the application was finally heard on 21 April 1982. This unusually long delay to have a simple application heard and disposed of was attributed to the fact that the Court file was missing and it only resurfaced well over a year after the hearing of the application was first fixed on 30 March 1981.

With the second defendant cited a party, there were the necessary steps taken to have the amended statement of claim served on both the defendants and they on their part, too, took their time to file their own defences and counterclaims and this was also followed by the filing of the replies and defences to the counterclaims by the plaintiff.

The second defendant too had also adhered to the habit of changing solicitors, for in the initial stages he had Messrs. Datuk Clough Thuraisingham, Raj & Co. to act for him. When he was added a party to these proceedings in 1982 he had retained Messrs. Yaacob, Woon & Rakan-Rakan but they were replaced by his present solicitors, Messrs. Sri Ram, Zulkifly & Kumar in August 1983.

With the introduction of the Rules of the High Court 1980, the plaintiff had, on 1 April 1983, after all the pleadings had been closed to issue summons for directions. The hearing of this application was adjourned *sine die* to give way to the second defendant's application to set aside a private caveat lodged by the plaintiff. This application was only heard on 21 September 1983 by Vohrah J and a month later on 20 October 1983, he dismissed the second defendant's application and ordered an early trial. Dissatisfied with this decision, the second defendant appealed and on 18 April 1984, the then Federal Court dismissed the appeal and confirmed the order for an early trial. However, before a hearing date could be fixed the summons for directions had to be restored and on 16 March 1985, the Senior Assistant Registrar made the necessary orders.

From the above it is clear that it is not the plaintiff alone who had delayed in prosecuting her claim as both the defendants, in instances I have highlighted above, not to mention the Court, had contributed to the delay. If indeed the defendants had felt that the delay had highly prejudiced their case, they did not however take any steps to have the claim against them dismissed for want of prosecution, especially so when they were not lacking in legal advice. From the manner in which these proceedings had been allowed to drag, I cannot but suspect that both the defendants were no less anxious to have the issues determined. They were quite content to let matters lie so that time may work to their advantage. In this present instance although there had been delay, I consider that it had not acted prejudicially against the defendants. As at 13 April 1974, the first defendant had already transferred the land to the second defendant and she must have benefited from its proceeds, as it was her intention all along to sell the said land to pay off her creditors and it is quite immaterial to whom she eventually sold it to. For that matter too, the second defendant had not done anything to the land since he acquired it and the only disadvantage they now experience is that both

cannot get their respective Counsels to testify on their behalf. Mr. Jayadeva died in May 1982 and Mr. Raj in January 1974 and at their deaths there was no way that this action could have proceeded to trial. Moreover the first defendant still has her other Counsels to testify on her behalf but she had not made any attempt to subpoena any of them and what is more both defendants had even decided not to testify to back up their own claims.

From the instances of delay that I have shown and in all fairness, I cannot positively conclude that the plaintiff had been guilty of unreasonable delay in having her claim determined 11 years after she had first filed her original statement of claim against the first defendant and three years after she had cited the second defendant a party to this suit.

As delay in this action has already been explained, I do not consider s. 32 of the Limitation Act 1953 which is relied upon by the defendants has any application to this action. Our s. 32 is similar to s. 29 of the English Limitation Act 1939 which states:

> Nothing in this Act shall effect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

Although the word "laches" is not expressly stated in the English section nonetheless the word "otherwise" is wide enough to include it. *Halsbury's Laws of England*, 4th Edn. Vol. 16 p. 1005 explains the workings of s. 29 with equitable claims as follows:

> In certain cases the Limitation Act 1939 applies expressly to equitable claims as in the case of equitable claims to land, and a court of equity of course, acts in obedience to the statutes and applies, in regard to such claims, the express bar of the statutes.

Thus it would seem that where there is a statutory period of limitation, laches has no application as the limitation period must be applied. This was so confirmed in the case of *Re Pauling"s Settlement Trust* [1961] 3 All ER 713. Moreover on the facts of the case before me there are special circumstances which make it unjustifiable that the plaintiff's claim can be defeated by the delay in her enforcing her claim. These special circumstances are the allegations of fraud and the manner in which the second defendant acquired title to the said land of which I shall consider presently.

I now come to Clause 9 of AB13 and to the first defendant's submission that the liquidated damages she had agreed to pay in the event of her failing to carry out her obligations under the first agreement be regarded as an alternative obligation and not construed as a security for the due performance of the agreement. The effect to be given for accepting the first of the two interpretations is to bar specific performance being decreed against her.

I consider that the proper way of interpretating the meaning of Clause 9 is to view the first agreement in its entirety. The agreement is a pre-conditioned agreement enforceable only upon the happening of a certain event i.e. the granting of extension of time by the Ruler-in-Council. In the event the extension was not granted, the agreement comes to an end and the first defendant will have to refund the deposit made by the plaintiff. If on the other hand, approval was granted but the first defendant refuses to perform, the plaintiff's remedies against her is not only damages for the breach but also specific performance of the contract. I am fortified by this conclusion in that s. 19 of the Specific Relief Act 1950 places no bar to the remedy of specific performance even though the parties to a contract have agreed to liquidated damages in the event of one party failing to meet his obligations under the contract. See the case of *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor*. [1982] 2 MLJ 92.

As the plaintiff relies on s. 340(2)(a) of the National Land Code 1965, I shall now deal with her allegations of fraud and misrepresentation against both defendants and to the second defendant's contention that in the absence of fraud, registration of the said land into his name gives him an indefeasible title as he was a *bona fide* purchaser for value. As the plaintiff alleges fraud the onus is on her to prove that the title of the second defendant is not indefeasible and the standard of proof required is the high standard of proof beyond reasonable doubt.

Sections 17 and 18 of the Contracts Act 1950 define fraud and misrepresentation to include any act which is intended to deceive. In the case of *Assets Co. Ltd. v. Mere Roihi* [1905] AC 176 fraud has been described as "dishonesty of some sort to denote transactions having consequences in equity similar to those which flow from fraud". What constitutes fraud must depend on the circumstances of each case (see the case of *Waimiha Sawmilling Co. v. Waione Timber Co.* [1926] AC 101) and in this instance the plaintiff has listed particulars of the fraud and misrepresentation as follows:

(1) Knowing the existence of the first contract and knowing that P132 was in the possession of Messrs. Ng Ek Teong & Partners for the purpose of obtaining the extension of time, the defendants had fraudulently represented to the Registrar of Titles, Wilayah Persekutuan that it was lost thereby inducing him to issue P136.

(2) Knowing that Messrs. Jayadeva & Zahir were acting for the administrator of the estate of the deceased chargee and that the discharge of the charge could be executed through them, the defendants falsely and fraudulently represented to the Registrar that the administrator could not be contacted thereby inducing the Registrar to cancel the memorial register relating to the said charge in P135 and to discharge the charge on 15 December 1973.

(3) Knowing that P132 was with Messrs. Ng Ek Teong & Partners, the defendants fraudulently induced the Registrar to register the transfer of the said land to the second defendant by representing that P132 was lost.

(4) Knowing that the completion date of the first agreement was within 14 days after the Ruler-in-Council had granted an extension of time the defendants with the intention to defraud the plaintiff executed and completed the registration of the transfer of the land on the same day the first defendant was informed that the Ruler-in-Council had granted the extension.

The second defendant admitted he knew way back in the sixties that the first defendant was the registered proprietor of the said land and that he was also aware of the existence of the first contract. Even with this knowledge, he did not enquire as to the circumstances leading to the termination of the first contract and whether the termination had been mutually agreed between the plaintiff and the first defendant. He merely relied on what Mr. Raj, his solicitor, had found out about the land, namely that it was charged, quit rent had been in arrears for five years and forfeiture proceedings were being threatened, assessment had also not been paid, and the legal notice to attach had been sent to the first defendant. That was all that Mr. Raj knew about the land and in all probability he was not even aware of the existence of the first contract when the second contract was executed on 9 September 1973. But the second defendant knew of the first contract and he had admitted that he did not ask Mr. Raj to look at the first agreement and in all probability too he did not inform Mr. Raj of the existence of the first agreement. This in itself is evidence that in September 1973, the second defendant was not a *bona fide* purchaser for value without notice of the plaintiff's claim to the land.

Despite being represented by solicitors, the second defendant wrote directly to the Registrar of Titles on 20 October 1973 (AB58) stating that P132 is "alleged to be misplaced and there is a possibility of indefinite delay in tracing the same". He admitted signing the letter but he maintained that it was drafted by his solicitors and sent by them with a covering letter which he was not able to produce. AB58 bears no address and there is no reason why it should be sent through a covering letter when the solicitors could easily have used their own letter-head to communicate directly with the Registrar. There is therefore no reason for the second defendant to communicate directly with the Registrar when he was already represented by solicitors and the fact that he did so points to an intention that is in no way sincere or above board. AB58 and its enclosures were received by the Registrar the same day as there is an endorsement in P135 that the private caveat lodged by the second defendant a week earlier was cancelled that very day pursuant to the application sent together with the letter.

The second defendant has also admitted that round about 28 November 1973, he became aware that P132 was with Messrs. Ng Ek Teong & Partners, as his own solicitors Messrs. Datuk Clough Thuraisingham, Raj & Co., had shown him a copy of AB81, a letter written by Dr. S. Thuraisingham stating, *inter alia*, that he had handed P132 to his solicitors, Messrs. Jayadeva & Zahir who in turn handed it to Messrs. Ng Ek Teong & Partners. With this knowledge, acquired two days earlier, and again without going through his solicitors, the second defendant wrote AB84 on 30 November 1973, directly to the Registrar of Titles enclosing a cheque in settlement of the charged sum and requesting him to register the discharge of the charge under s. 279 of the National Land Code 1965 as the chargee was dead. He did not mention in AB84 that P132 was with Messrs. Ng Ek Teong & Partners and neither did he offer any information that the estate of the deceased chargee was represented by Messrs. Jayadeva & Zahir. AB84 must have been delivered to the Registrar the same day as there is a cancellation of the endorsement of that date in P135, and another date substituted in its place.

Then on 12 March 1974, the second defendant affirmed the statutory declaration AB89 which he maintains was prepared by his solicitors but which I consider to be his own doing. In it, he declares that since his enquiries of P132 from the beneficiary of the estate of the deceased chargee were unsuccessful, he therefore applies for a title in continuation. Again he omits to disclose material particulars of P132 in AB89 as he had done previously in AB84.

Under these circumstances, is there a duty on the part of the second defendant to make disclosures of P132 in AB84 and AB89? The answer to this lies as to the nature and purpose of the documents. AB84 was sent for the purpose of inducing Registrar to effect a discharge of the charge without the proper Memorandum of Discharge being executed by Dr. S. Thuraisingham and without the production of P132. Likewise AB89 was sent to convince the Registrar to issue a title in continuation as alleged attempts to trace P132 were unsuccessful. Unlike AB84, AB89 is a statutory declaration for which the law imposes a penalty where a person making such a declaration makes any statement which is false or which he either knows or believes to be false and does not believe to be true touching any point material to the object for which the declaration is made or used. (See s. 3, Statutory Declarations Act 1960 and ss. 199 and 200 of the Penal Code). That being the case would the Registrar have cancelled the charge on 5 December 1973 and issued P136 on 22 August 1974 had he been aware that P132 was with Messrs. Ng Ek Teong & Partners? PW3 replied that the Registrar would not have done so and would have rejected the second defendant's applications and to that extent the second defendant's action is concealing the true facts of P132 from the Registrar is itself fraudulent.

The second defendant's application for the issue of a title in continuation is made in pursuant to s. 166 of the National Land Code 1965. Section 166(1)(d) permits the Registrar to issue such a title if the issue document of title:

(1) is lost; or

(2) is wholly or partially destroyed; or

(3) is being improperly or wrongly withheld.

As the application was made through AB89, the second defendant did not expressly state on which ground he had relied other than stating that his attempts to obtain P132 had been unsuccessful. As his application did not conform with s. 116(1)(d), the Registrar should have rejected it but he did not, and have stated that P132 was lost in Form 10D. This is far from the truth as P132 was in the custody of Messrs. Ng Ek Teong & Partners all the time, a fact known and admitted by the second defendant.

The second defendant also contends that he never suggested in AB89 that P132 was lost but that it was the Registrar who had concluded so in Form 10D which he received through AB93. It is interesting to note from AB93 that the Registrar wrote directly to him and not to his solicitors or copied the letter to them and this dispels the second defendant's contention that all correspondence with the Registrar were made by his solicitors or through their covering letters. Form 10D is a notice of the intention of the Registrar to issue a title in continuation which is reproduced in AB94, the Gazette Notification. Reading Form 10D, the second defendant must have been aware that the reference made by the Registrar that P132 was lost is wrong as he knew exactly where it was but he did nothing to correct this mistake. This in itself is another instance of a misrepresentation as keeping silent as to the truth is just as fraudulent as expressing a fact which is untrue and which is intended to defraud.

The charge over the said land was discharged on 5 December 1973 and I shall now consider the manner in which this was done.

The second defendant was aware all the time that the only way that the charge could be discharged was by Dr. S. Thuraisingham executing a Memorandum of Discharge and submitted this together with P132 to the Registrar. However, at AB81 Dr. S. Thuraisingham had refused to accept payment of the charged sum as he could not give a valid discharge of the charge without P132 which was with Messrs. Ng Ek Teong & Partners. The second defendant never wrote to Messrs. Ng Ek Teong & Partners for the return of P132 for he knew that they would not release it to him but instead wrote AB84 dated 30 November 1973 directly to the Registrar applying to have the charge discharged under s. 279 of the National Land Code 1965 by paying the charged sum due to the Registrar as the chargee was dead. The second defendant never disclosed in AB84 that the estate of the deceased chargee was represented by Messrs. Jayadeva & Zahir who would be able to advise the Registrar if called upon to confirm matters raised in AB84.

Reading s. 279 of the National Land Code 1965, it is clear that the only person who can apply to have the charge discharged is the chargor himself, in this case the first defendant. When cross-examined the second defendant admitted that he was not expressly authorised by the first defendant to seek a discharge of the charge and under the circumstances he did not have the capacity in law to make the application and the Registrar should have rejected it. However, the Registrar did not do so and acting under ss. 280 and 314 of the National Land Code 1965, he cancelled the memorial of the charge in P135 without the production of P132 and there is therefore no corresponding cancellation of the memorial of the charge in

P132. Although the charge was discharged on 5 December 1973, there is an entry of the date, 30 November 1973 in P135 but this date is cancelled and altered to 5 December 1973. There was no explanation given as to this alteration and all in all the acts of the second defendant in failing to disclose the whereabouts of Dr. S. Thuraisingham and the manner in which the charge was discharged is not only highly suspicious but that it was made in breach of ss. 279 280 and 314 of the National Land Code 1965.

On the 13 March 1974, the Registrar effected the transfer of the said land from the first to the second defendant in P135. This was done contrary to ss. 294 and 306 of the National Land Code 1965, as the memorandum of transfer was not accompanied by P132. Under s. 294(4) and s. 299(1), registration of a transfer without production of the issue document of title can only be effected in circumstances where the Registrar has dispensed with its production. No evidence was adduced by the second defendant that such dispensation had been granted by the Registrar and thus the transfer like the discharge of the charge was effected in circumstances contrary to the revelant provisions of the National Land Code 1965, arising from the dishonest acts of the second defendant in concealing the whereabouts of P132. I need also mention here that the land registry files pertaining to dealings in the property have been misplaced and there is therefore no way of ascertaining the truth as to the circumstances that led to the Registrar acting as he did in discharging the charge, effecting to the transfer of the land to the second defendant and the issuing of the title in continuation in complete disregard to the relevant provisions of the National Land Code 1965.

Although the charge was discharged on 5 December 1973, no attempt was made by the second defendant to register the transfer immediately after that date. All along he had acted with haste and the minimum of delay, to pay off the balance of the purchase price, the amount due on the charge and after the charge was discharged on 5 December 1973, there was nothing to prevent him presenting the transfer after that date but he waited three months until 13 March 1974 to do so. This date is relevant as it was on that date that the first defendant was formally informed that her application for an extension of time was granted by the Ruler-in-Council. The second defendant must have presented the transfer on 13 March 1974 as there is PW3's unrebutted evidence that registration goes back to presentation. Thus by presenting the transfer on 13 March 1974, the second defendant must have been aware of the requirement under the first agreement, that transfer can only be effected within 14 days of the granting of the extension of time. There is therefore no mistaking the intention of the second defendant that when he presented the transfer on that date it was only for the sole purpose of depriving the plaintiff of her right to the said land.

There is overwhelming evidence in this case that the fraud and misrepresentations particularised in para. 13 of the statement of claim have been proved beyond reasonable doubt. The devious ways and means practised by the second defendant have all resulted in the Registrar cancelling the charge without the proper party executing the Memorandum of Discharge of the charge and without production of the issue document of title, transferring of the land in the name of the second defendant, again without production of the issue document of title and the issuing of a title in continuation on the ground that the issue document of title had been lost. That being the case there is therefore no merit to the defendant's contention that there are insufficient evidence to support the particulars of fraud and misrepresentations as pleaded by the plaintiff.

The second defendant is related to the first defendant both by blood, (they being first cousins) and by marriage, (he being her brother-in-law) and he is also one of the executors of the estate of his brother, the first defendant's husband. Because of these relationship,

there is the first defendant's admission that she left everything to the second defendant after she had executed the second agreement, but the second defendant had to have the concurrence of the first defendant to execute documents like Forms 14A transferring the property from her to him. To that end when considering the actual fraud committed by the second defendant, the first defendant must have been aware all along what her brother-in-law was up to and to that extent the allegation of conspiracy pleaded by the plaintiff has also been satisfactorily proved.

Both the defendants had testified, not on their own volition, but as witnesses for the plaintiff and to that end they were reluctant witnesses whose evidence I accept with some reservation. In the case of the second defendant particularly, he was ordered to be cross-examined when he became evasive and he refused to answer questions directly and was quick to shift the responsibility for acts he had committed to his solicitors. He did not disclose in his discovery and even during the trial, pertinent documents like this application for the removal of his first caveat that was attached to AB58 and the transfer document, Form 14A of the transfer of the property to him. He gave no reason for his inability to do so apart from eluding that they have been misplaced but I cannot accept this vague explanation as Counsels have been able to gather sufficient documentary evidence in AB1-129 to show that not all documents have been misplaced. From his reluctance I can only conclude that production of such documents can only work against his interest and to that end s. 114(g) of the Evidence Act 1950 applies.

There is yet other point I need to consider i.e. the defendant's contention that the failure of the plaintiff to lodge a caveat over the land from 1973 to 1978 should be held against her. The argument here is that if the plaintiff had done so after executing the first agreement and before 9 September 1973, this would have put the second defendant to notice and would be very relevant to the determination of the competing claims of the plaintiff under the first agreement and that of the second defendant under the second agreement. The rule is where there are two **equal** and competing claims, the first in time gets priority, but this is altered when the first in time does not lodge a caveat to protect his interest to the prejudice of the second claimant. In this case can the claims of the plaintiff and the second defendant be regarded as equal as against each other? I answer this in the negative as what is challenged by the plaintiff are the ways and means that have been engineered by the second defendant to obtain ownership of the land and since I have already held that his dealings all along have been fraudulent it cannot be said that he had been in any way prejudiced by the failure of the plaintiff to lodge a caveat. In the circumstances of this particular case there is nothing to hold against the plaintiff failing to lodge a caveat between 1973 to 1978.

As the second defendant's title has been shown to be not indefeasible, the plaintiff succeeds in her claim against him to have P136 cancelled, rectification of all entries in P135 after 9 September 1973 to correspond to those appearing in P132, and damages.

The proper measure of damages in this case must be the loss suffered by the plaintiff for being deprived of the use of the land. She had intended to build a house costing RM400,000 on it and PW2, a Chartered Surveyor testified that to build a bungalow on the land in 1973 - 1974 would cost RM60 - RM65 per square foot. Based on the same design and the same materials, the costs of the house today would be RM95 per square foot. PW2's unchallenged evidence shows that there had been an increase of RM30 per square foot or 30% of the costs of construction and it is this increase which I consider to be the damages actually suffered by the plaintiff, which works out to be RM120,000. This sum however is to be offset against the amount of quit rent and assessment paid by the second defendant amounting to

RM3,750.80, (see AB113, 114 and 120) thereby reducing the amount of damages due to the plaintiff to RM116,249.20.

As against the second defendant then there will be judgment to the plaintiff on the following terms.

(1) The Registrar of Titles, Wilayah Persekutuan to cancel the title in continuation, P136.

(2) The Registrar of Titles, Wilayah Persekutuan to delete the discharge of charge and to restore the same on to the registry document of title, P135.

(3) The Registrar of Titles, Wilayah Persekutuan to cancel the transfer registering the said land to the second defendant in the registry document of title, P135.

(4) Damages at RM116,249.20, which will carry interest at 6% per annum from 23 July 1973 to date hereof.

As for the second defendant's counterclaim as there was no evidence led, it is dismissed with costs.

As for the first defendant there will be judgment against her on the following terms.

(1) Specific performance of the agreement dated 14 July 1972 with the plaintiff paying the balance of the purchase price within one month from the date hereof and the second defendant obtaining a valid discharge of the charge within one month after payment of the balance of the purchase price and to execute the memorandum of transfer in favour of the plaintiff within one month thereafter.

(2) Damages at RM9,300 pursuant to s. 75 of the Contracts Act 1950 and interest at 6% per annum from 23 July 1973 to date hereof.

As she too had not led to any evidence on her counter-claim, it is also dismissed with costs. Lastly, the plaintiff is awarded costs of this suit.

Also found at [1986] 1 CLJ 228